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To (b) (6), (b) (7) R6/USEPA/US@EPA, (b) (6), (b) (7)  
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cc  
bcc

Subject Rabun Dairy case. Nauseatingly long declination letter. So many people worked on this case that you are welcome to share this as you see fit.

To all concerned,

After much agonizing and excessive hand wringing, I have decided to decline the Rabun Dairy case. In thoughtful retrospection, it is something I should have done some time ago. Many people, especially SA (b) (6), (b) (7) and TCEQ Investigator (b) (6), (b) (7)(C) have expended much time and great energy on all aspects of this case at my request and I realize that my prolonged indecision has caused significant waste of already overtaxed resources and thus delayed investigation and prosecution of other important cases. For this I apologize to all involved, but especially to (b) (6) and (b) (6).

I confess it is difficult for me to decline a case that good agents want me to take. Especially agents as good as (b) (6) and (b) (6). I don't do it very much and that may be part of the reason I'm not very good at it. The worst kind of prosecutor is the type who continually tasks the investigators with endless errands and then, once all the errands are completed, at the end of the day, he still declines the case. I have, to a large extent, behaved that way on this case. I've even squandered my own time and the Government's resources with repeated trips to the Dallas office to discuss the case and with repeated trips to the Sherman office to put 3 witnesses before the (b) (6), (b) (7)(C). I think I was hoping for some type of epiphany from beyond that would smack me in the head and make everything fall into place. Hopefully, I've learned from my mistake. My obvious feelings of guilt are aggravated by the fact that I'm the one who agitated for TCEQ and EPA to get involved in the matter in the first place.

Those very familiar with the case know that, like all cases, this one had its share of problems, most of which were caused by the state's failure to conduct a timely and thorough investigation: poor documentation of the discharge, no samples of the pollutant, no direct evidence that the discharge entered a covered water, no documented environmental harm, a low profile, small scale, family farm suspect, with no prior record of environmental violations and a good reputation in his community, evidence of extenuating circumstances that motivated the discharge, which supports the suspect's contention that the discharge was an aberration, and perhaps most problematic, a complaining witness we dare not put on the stand. For me though, the true Achilles heel of the case is the matter of jurisdiction.

Many of us could write a 10 page paper on the post (b) (6), (b) (7)(C) jurisdictional issue as it applies to this case. The EPA generously brought forth all the requested input and expertise on this issue. The analysis and opinions offered were knowledgeable, intelligent and well reasoned. However, in the final analysis, in my opinion, proving jurisdiction, beyond a reasonable doubt, to

12 East Texas jurors, given the evidence we have right now and the overall nature of the case, would be an unacceptably uncertain endeavor. As we discussed, we could expend more time and resources on modeling to help us prove how far the discharge probably traveled, but at this point I don't think it's worth it. Even if we got a conviction on the case, the likely sentence would be probation and a relatively small fine. In sum, assuming we should be willing to take to any case we indict to trial, I don't think the case offers a big enough bang for the buck.

We all have other fish to fry and we all have to apportion our time and energy so that we maximize our productivity and impact. Unencumbered by the Rabun matter, I'm ready to charge full speed ahead on our remaining cases and matters and I hope you'll continue to entrust me with your new investigations as they arise, despite my missteps in Rabun. You folks are an excellent bunch and I really enjoy working with you.

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